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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1012

FRIBESCO S.A. and OTELLO MANTOVANI,
Petitioners,
against

MITSUI & CO., (U.S.A.), INC., FINAGRAIN S.A. COM-
PAGNIE COMMERCIALE AGRICOLE FINANCIERE
a/k/a "FINAGRAIN" COMPAGNIE COMMERCIALE
AGRICOLE FINANCIERE S.A., R. PAGNAN & F.lli,
LOUIS DREYFUS CORPORATION and TRADAX
OVERSEAS, S.A.,
Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

**BRIEF FOR RESPONDENT "FINAGRAIN" COMPAGNIE
COMMERCIALE AGRICOLE ET FINANCIERE S.A.
IN OPPOSITION**

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**BRIEF FOR RESPONDENT "FINAGRAIN" COMPAGNIE
 COMMERCIALE AGRICOLE ET FINANCIERE S.A.
 IN OPPOSITION**

This brief is submitted on behalf of Respondent "FINAGRAIN" Compagnie Commerciale Agricole et Financiere S.A. (hereinafter "FINAGRAIN") in opposition to Petitioners' Petition for Writs of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department.

Opinions Below

The opinion of the Supreme Court of the State of New York, New York County, Special Term, Part I (Stecher, J.), has not been reported. A copy of the opinion is Appendix A to the Petition.

The orders of the Appellate Division, First Department, of the Supreme Court of the State of New York, unanimously affirming the orders of Special Term on the opinion of Stecher, J., are reported at 58 A.D.2d 513-514, 394 N.Y.S. 2d 832-834 (1st Dept. 1977). Copies of said orders are Appendix B to the Petition.

The order of the Court of Appeals of the State of New York denying leave to appeal thereto from the orders of the Appellate Division, First Department, is reported at 42 N.Y.2d 811, — N.Y.S.2d — (Ct. of App. 1977). A copy of said order is Appendix C to the Petition.

Jurisdiction

"FINAGRAIN" does not agree that this Court has jurisdiction under 28 U.S.C. § 1257(3). No federal question exists with respect to the first Question Presented, *infra*, unless Special Term was in error. No federal question exists with respect to Petitioners' objection to the Grain Panel of the American Arbitration Association. "FINAGRAIN" sets forth with more particularity its jurisdictional objections under Points I and II, *infra*.

Questions Presented

The questions presented are not correctly stated in the Petition. In fact, simply stated, the questions presented are:

1. Was Special Term correct in asserting that "Whether the principles underlying the United States

grain standards Act (7 U.S.C. § 71, *et seq.*) are being carried out by the Department of Agriculture is not an issue before this Court" (A.2)?

2. Was Special Term correct in dismissing Petitioners' attack on the Grain Panel of the American Arbitration Association and on the individual members of the Panel?

Restatement of the Case

Respondent "FINAGRAIN" sets forth certain salient facts of this case because of inaccuracies and misleading statements in the Petition for Writs of Certiorari.

The case at bar involves a so-called string of grain contracts. "FINAGRAIN" sold to Respondent R. Pagnan & F.lli (hereinafter Pagnan) on January 7, 1975, 25,000 LT of No. 3 Yellow Corn, F.O.B. Buyer's vessel at one safe (U.S. Gulf) port at Seller's option for delivery April 1975. Prior thereto, on or about January 2, 1975, Respondent Pagnan had sold the same commodity, under essentially the same terms and conditions, to Petitioner Fribesco S.A. (hereinafter Fribesco).

On May 7, 1975, Petitioner Fribesco nominated the Vessel MOSGULF to load the Pagnan cargo. ETA in the Gulf was given by Fribesco as May 22, 1975. Shortly after receipt of this advice from Fribesco, Pagnan advised "FINAGRAIN" to load the cargo aboard the MOSGULF, giving "FINAGRAIN" the ETA as above. These sales were back to back, and in fact Pagnan applied the purchase contract with "FINAGRAIN" against the sales contract with Fribesco.

On or about June 10, 1975, a dispute arose between Pagnan, Fribesco, and "FINAGRAIN" involving the right, if any, of Fribesco to have the cargo of corn sampled at the end of the loading spout rather than by means of the mechanical diverter which was the only device sanctioned by the United States Department of Agriculture (hereinafter U.S.D.A.).

Petitioner Fribesco declined to load the *Mosgulf* or any other vessel with the corn purchased as aforesaid.

Petitioners have from the outset of this litigation endeavored to draw a spurious distinction between "foreign importers of United States grain" and "United States exporters of U.S. grain" (Petition 3). The grain industry in this country and in foreign countries is composed of individuals, partnerships, and corporate entities which trade grain and which act as brokers in the trading of grain. A given lot of American grain may be bought and sold literally dozens of times before it is actually loaded aboard a vessel and ultimately consumed. The grain may even be traded while it is aboard a vessel on the high seas. A buyer of a lot of grain may sell the lot within hours or even minutes of the purchase. While the grain is being loaded aboard a vessel, it may be owned by a so-called foreign importer. This may be seen by the fact that Petitioner Fribesco S.A., describing itself as a foreign importer, refused to accept delivery of a lot of grain from Respondent R. Pagnan & F.lli, which Petitioner also describes as an Italian grain importer. In other words, a so-called importer was buying the grain from another so-called importer.

Petitioners attempt to draw this distinction in an effort to discredit the members of the Grain Panel of the American Arbitration Association as mere puppets of the so-called "five major U.S. grain exporters." The inaccuracy of this distinction between "exporters" and "importers" was recognized by Justice Stecher in describing the Grain Panel as being "composed of employees of the major grain traders and brokers." (A. 3)

As will be discussed more fully under Point II, *infra*, Petitioners have until now taken the position that the members of the Grain Panel of the American Arbitration Association "are men of impeccable honor and honesty."

(Fribesco's Brief in the Appellate Division, p. 28.) Now that Petitioners seek a Writ or Writs of Certiorari, they seem to have forgotten the high esteem in which they have hitherto held the members of the Grain Panel. Petitioners deceptively state that "the original members of the panel were all sponsored jointly by Cargill Incorporated and Continental Grain Co. . . ." (Petition 15). Upon the demise of the New York Produce Exchange, the arbitration function was transferred to its successor, the International Commercial Exchange. When the latter also went out of existence, the American Arbitration Association merely took over the old rules and one of the two panels, together with all of its members. Petitioners' assertion that Cargill and Continental "sponsored" the panel is misleading to say the least.

POINT I

The dispute herein does not fall within the narrow category of issues which, for public policy reasons, are not arbitrable.

The issues presented to this Court are of importance only to the parties to this litigation. Petitioners contend that arbitral resolution of their disputes with Respondents "would have a broad effect upon the system of export grain merchandising in the United States" (Petition 7) and that such arbitral resolution is, therefore, against public policy. This position is untenable for two reasons. First, Petitioners apparently seek to change or vary the policies or procedures of entities which are not parties to these disputes or this litigation, namely the United States, the U.S.D.A., and the North American Export Grain Association (hereinafter "NAEGA"). Second, the issues involved in these disputes are not of a nature requiring judicial rather than arbitral determination.

At the outset, it must be stressed that neither the United States nor the U.S.D.A. is now or has ever been a party to this litigation. By their own admission, Petitioners have shown that the federal government has mandated not only that American grain must be inspected prior to its export but also the methods by which the grain was and is to be inspected. Petitioners do not now contend—nor have they ever contended—that the method of inspection was in violation of the then applicable federal regulations. Their contention is merely that the then applicable methods and procedures, as promulgated by the U.S.D.A., did not adequately reflect the intent of Congress as set forth in the United States Grain Standards Act. In short, Petitioners are demanding that private contracting parties defend regulations and procedures in which they had no hand in creating and over which they exercise no power of change. The obvious question arises: Why have Petitioners failed to seek relief against the United States or the U.S.D.A.?

All of the litigation involving these disputes has from its inception been prosecuted in the Supreme Court and the Court of Appeals of the State of New York under the provisions of the New York Civil Practice Law and Rules (hereinafter CPLR) involving arbitration of disputes (CPLR §§ 7501-7514). Now the Petitioners seek a writ or writs of certiorari to this Court, they aver that “the contracts in question ‘evidence [sic] . . . transaction[s] involving commerce’ within the meaning of the federal Arbitration Act (9 U.S.C. § 2)” (Petition 6, footnote). It is submitted that Petitioners’ averring that this dispute falls within the ambit of Title 9 of the United States Code is a tacit admission that this Petition also falls within the ambit of the case of *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (hereinafter *Alberto-Culver*), which case will be more fully discussed below.

In the case at bar, the contracts were for the sale and purchase of grain. The federal government, in turn, has mandated methods and procedures which must be followed in the execution of such contracts for the sale of American grain abroad. Respondent “FINAGRAIN” merely demanded that Petitioner Fribesco honor its contractual obligations and that the execution of the duties and obligations of the parties be carried out in a legal fashion in accordance with the then applicable regulations and procedures promulgated by the federal government. It cannot be said that either the agreement for the sale or purchase of grain or the agreement to arbitrate contained within or made a part of the principal agreement is illegal. The contract is fully enforceable. As was pointed out by Justice Stecher on the second page of his memorandum, “Fribesco does not seriously contest that there is a valid arbitration agreement between itself and petitioner.” (A. 2)

This Court’s decisions are legion in support of Respondents’ position that the contracts under consideration are altogether enforceable. This is especially so with regard to trade and commerce in world markets. In the *Alberto-Culver* case, *supra*, Alberto-Culver purchased three enterprises owned by Scherk and organized under the laws of Germany and Lichtenstein, together with all trademark rights of these enterprises. The contract of sale contained a number of express warranties whereby Scherk guaranteed the sole and unencumbered ownership of these trademarks and an arbitration clause providing for arbitration before the International Chamber of Commerce in Paris.

Nearly one year after the closing of the transaction, Alberto-Culver allegedly discovered that the trademarks were subject to substantial encumbrances. Alberto-Culver thereupon tendered back to Scherk the property and offered to rescind the contract, which offer Scherk refused. Alberto-Culver then commenced an action in U.S. District Court in Illinois for damages and other relief, contending that Scherk’s fraudulent representations concerning the

status of the trademark rights constituted violations of § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U.S.C. § 78(b), and Rule 10b-5 promulgated thereunder, 17 CFR § 240.10b-5.

Scherk filed a motion to dismiss the action for want of personal and subject matter jurisdiction and on the basis of *forum non conveniens* or, alternatively, to stay the action pending arbitration in Paris pursuant to the agreement of the parties. The District Court denied Scherk's motion to dismiss and granted a preliminary order enjoining Scherk from proceeding with arbitration. The Court of Appeals for the Seventh Circuit affirmed, 484 F.2d 611, upon what it considered the controlling authority of *Wilko v. Swan*, 346 U.S. 427 (1953) (hereinafter *Wilko*).

This Court held that the *Wilko* decision did not apply. The Court found "crucial differences" between the agreement involved in *Wilko* and the one signed by Scherk and Alberto-Culver. *Wilko* involved the laws of the United States generally and the federal securities law in particular. The Alberto-Culver dispute, on the other hand, was truly international and involved contracts with numerous foreign countries. (Cf. Restatement, Second, Conflict of Laws § 188(2).)

This Court stated:

A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.

417 U.S. 506, 516 (Footnote omitted).

The language of the *Alberto-Culver* decision is very much in point in the case at bar. "Orderliness and predictability" in the grain trade is patently a goal which the grain trade has sought to achieve by adopting standard contract forms such as the NAEGA 2 contract. Contracts for the sale of grain are highly specialized and are frequently linked together in so-called "strings." Each party in the string relies on the provisions of the form contract to define its rights and obligations.

In the case of *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (hereinafter *The Bremen*), this Court held that a "forum clause should control absent a strong showing that it should be set aside." 407 U.S. 1, 13. It noted that:

... much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place [where personal or *in rem* jurisdiction might be established]. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.

407 U.S. 1, 13-14.

The *Alberto-Culver* decision is dispositive of this issue raised by the Petition. This Court's language is fully applicable to the dispute between the parties in this matter:

An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would as well reflect a "parochial concept that all disputes must be resolved under

our laws and in our courts We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." [Citing *The Bremen*, 407 U.S. 1, 9]

416 U.S. 506, 519.

The *Wilko* case, *supra*, upon which Petitioners rely, involved an action by petitioner, a customer, against respondents, partners in a securities brokerage firm, to recover damages under the Securities Act of 1933. Respondents' motion to stay the action pending arbitration pursuant to § 3 of the United States Arbitration Act was denied by the District Court. The Court of Appeals reversed. This Court reversed.

The Court considered two policies of Congress: the desire to secure prompt, economical, and adequate resolution of controversies through arbitration on the one hand and the need to protect the rights of investors on the other hand. The court held that the protective provisions of the Securities Act require the exercise of judicial direction fairly to assure their effectiveness.

Much of the reasoning of this Court stressed "that the purpose of Congress was to assure that sellers could not maneuver buyers into a position that might weaken their ability to recover under the Securities Act." (346 U.S. 427, 432)

This concept of protecting economically weaker buyers does not apply to the case at bar. It reflects merely an attempt by a buyer of a grain contract to avoid the impact of a falling market which made its performance of the contract economically disastrous.

As grain dealers, both as sellers and buyers, Petitioners knew the provisions of standard grain contracts and could have used other forms which would have provided for inspection and sampling at destination or arbitration other

than before the Grain Panel of the American Arbitration Association. They did not elect to do so. The NAEGA 2 contract was used, and its provision for arbitration was knowingly selected by Petitioners, established and knowledgeable grain traders which have used this form on many prior occasions when they were sellers as well as buyers. It is submitted that Petitioners' present position is motivated only by economic considerations. Furthermore, the *Wilko* decision has been essentially reversed with regard to trade and commerce in world markets. The *Alberto-Culver* case is now the law in instances involving international commerce and arbitration agreements.

Petitioners also rely upon the case of *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969) (hereinafter *Lear*). Petitioners state that certificates of grain inspection "represent a legal conclusion which may be the subject of error" (Petition 12) This is simply not a correct statement. A grain inspection certificate is at most a factual conclusion, with certain legal consequences. It may more properly be said to be a document setting forth several characteristics of a given lot of grain, such as its colour, kernel size, water content, etc. The *Lear* case simply could not be less in point.

Petitioners have furnished no authority to support their position that the contract provisions making the U.S.D.A.'s inspection binding on all parties as to quality and condition is against public policy. Further, they assert that the determination of this issue should be left to the Court and not to arbitrators who allegedly have a vested interest in preserving this clause even though Petitioners are buyers as well as sellers in transactions to which this clause applies.

It would be to state the obvious to say that Respondent "FINAGRAIN" is aware of no theory or authority to the effect that a buyer and seller of merchandise cannot agree that a certificate issued under the aegis of the Department

of Agriculture will be binding on the parties, without violating public policy.

Petitioners' position seems to be that they were justified in their anticipatory breach of contract because the inspection certificates could have misrepresented the quality of the grain. None of the parties to the contract, however, had any power to change these inspection methods. Petitioners have refused and continue to refuse to challenge directly the regulations and procedures of the U.S. Department of Agriculture. This Court is an altogether improper forum for Petitioners to use in order to circumvent the established procedures of the U.S.D.A.

In the case of *Elbow Lake Cooperative Grain Company v. Commodity Credit Corporation*, 144 F.Supp. 54 (D. Minn., 6th Div. 1956), *aff'd* 251 F.2d 633 (8th Cir. 1958), plaintiffs, grain warehousemen, objected to the method of sampling used to grade defendant's flaxseed. The court refused to allow plaintiffs to make a collateral attack on federal grain inspection certificates. The plaintiffs sought to prove the invalidity of the certificates as a necessary step in proving an alleged breach of Grain Storage Agreements entered into between the parties. The court totally disallowed any such collateral attack because it found that plaintiffs had "failed to exhaust their administrative remedies." 144 F.Supp. 54, 61.

The *Elbow Lake* case is cited with approval in the more recent case of *Farmers Elevator Mutual Insurance Company v. Stanford*, 280 F.Supp. 523 (N.D. Tex. 1967), *aff'd* *Millers Mutual Fire Insurance Company of Texas v. Farmers Elevator Mutual Insurance Company*, 408 F.2d 776 (5th Cir. 1969). In this later case, the court again stressed the importance of exhausting administrative remedies and reiterated earlier court decisions holding that failure to exhaust administrative remedies precludes any collateral attack upon grade determination. (See 280 F.Supp. 523, 531.)

In conclusion, Petitioners have cited no case to support their contention that to arbitrate this dispute would in some way circumvent public policy. This Petition should be denied on the precedent of the *Alberto-Culver* and *The Bremen* cases; on the statutory law of New York as set forth in CPLR § 7501 *et seq.*, and on the clear and unambiguous terms and conditions of the contracts between the parties.

POINT II

The Grain Panel of the American Arbitration Association is the appropriate forum for the arbitration of this dispute.

Respondent "FINAGRAIN" submits that this Court does not have jurisdiction to consider Petitioners' attack on the Grain Panel of the American Arbitration Association—a purely procedural attack. As was pointed out under Point I, *supra*, Petitioners have until now litigated these matters under the provisions of Article 75 of the CPLR.* Now that Petitioners seek a writ or writs of certiorari, they invoke the United States Arbitration Act (9 U.S.C. § 1 *et seq.*). However, even the most generous interpretation of the Federal Arbitration Act does not indicate that the entire Grain Panel may be disqualified because of bare assertions of tenuous connections with the parties to this litigation. As was pointed out in the Restatement of the Case, *supra*, many of Petitioners' allegations of fact are simply untrue.

Even if this Court does have jurisdiction to consider Petitioners' attack on the Grain Panel, it is submitted that the attack is totally without merit. Petitioners' argument that the Grain Panel has a vested interest in protecting

* It is to state the obvious to note that a federal question is not raised under 28 U.S.C.A. 1257(3) by an attack on state court decisions under a state procedural statute

so-called exporters is frivolous. Prior to and during exportation, the ownership of any given lot of grain may pass through numerous grain trading companies, both domestic and foreign. Each company seeks to improve its position by careful observation and expert knowledge of the grain industry and can be both a buyer and a seller in the same string. Few companies can, therefore, be cast solely in the rôle of exporters. As pointed out herein, Petitioner Fribesco, although a so-called importer of grain, is also a seller of grain to the very companies whose personnel sit on the Grain Panel.

The grain trade is not alone in utilizing members of a specific trade to serve as arbitrators of disputes between parties in that trade. The American Arbitration Association maintains a special panel of arbitrators for use by the National Institute of Oil Seed Products S.F.; the American Fats and Oils Associations Inc. of New York utilizes arbitrators selected from a list submitted by the American Arbitration Association. The National Soybean Processors Association utilizes the American Arbitration Association Commercial Rules, but the parties select an arbitrator from a list submitted by the American Arbitration Association consisting of persons knowledgeable in the trade. The textile industry uses a division of the American Arbitration Association known as General Arbitration Counsel of the Textile Industry (GACTI).

In the recent case of *Copen Associates, Inc. v. Dan River, Inc.*, 53 A.D.2d 843, 385 N.Y.S.2d 557 (1st Dept. 1976), the Appellate Division addressed a problem precisely like the one in the case at bar. In the *Copen* case, respondent demanded arbitration with the petitioner. Petitioner sought a stay designating five grounds, one of which was the fact that the respondent selected a division of the American Arbitration Association known as General Arbitration Council of the Textile Industry (GACTI) as the tribunal,

which organization is allegedly controlled by large organizations in the textile field, including the respondent. Special Term granted a stay to permit the petitioner to conduct disclosure on the issue of bias and control.

The Appellate Division reversed Special Term and denied the stay. It held:

... one purpose of arbitration is expedition, and the litigation ought not to be protracted. See *Matter of Weinrott (Carp.)*, 32 N.Y.2d 190, 199, 344 N.Y.S.2d 848, 856, 298 N.E.2d 42, 47. As an initial matter, GACTI being a division of the American Arbitration Association, the arbitration should go forward. If bias or control should be developed, there is a regular procedure set forth in CPLR § 7511 for raising that question after the determination.

53 A.D.2d 843, 844, 385 N.Y.S.2d 556, 557.

It is submitted that the *Copen* case is dispositive of this issue, Petitioner Fribesco has not only failed to show bias on the part of the members of the Grain Panel, but it has at all times during this protracted and dilatory litigation admitted that "all the members of the Grain Arbitration Panel are men of impeccable honor and honesty. . . ." (See Restatement of the Case, *supra*.) In view of this admission on the part of Petitioner Fribesco and in light of the *Copen* decision by the Appellate Division, it is unthinkable that this arbitration should be stayed because of bare assertions of possible bias on the part of some members of the Grain Panel.

In summation, Petitioner Fribesco agreed, in a free grain market, to arbitrate under the Grain Arbitration Rules of the American Arbitration Association. These rules provide for an expert panel drawn from the grain trade at large. These experts are highly suited to hear and determine these disputes and the Petitioners' contentions. The policy of the New York and federal courts favours such a

panel. Petitioners agreed to arbitrate before a panel which they concede cannot be faulted as far as its honesty and integrity is concerned. The law requires that Petitioners be held to the terms of their unambiguous contract.

CONCLUSION

For the reasons hereinabove set forth, the Petition should be denied.

Respectfully submitted,

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